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No. 95-244

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, Insurance Commissioner of the State of California, in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Corporation Trust,

*Petitioner,*

vs.

ALLSTATE INSURANCE COMPANY,

*Respondent.*

Petition for Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

**BRIEF OF THE COMMISSIONER OF INSURANCE OF  
THE STATE OF MISSOURI AS *AMICUS CURIAE*  
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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**Motion for Leave to File Brief of Amicus Curiae  
in Support of Petition for Writ of Certiorari**

COMES NOW the Director of the Department of Insurance, Amicus Curiae, and hereby requests leave of the Court to file his Brief of Amicus Curiae in Support of Petition for Writ of Certiorari for the reasons stated below:

1. The Director of the Department of Insurance is the duly appointed head of the state agency of the State of Missouri responsible for the regulation of insurance companies, including the supervision, rehabilitation and liquidation of financially impaired insurers domiciled or doing business in the State of Missouri. Within his authority as Director, he may maintain actions in his official capacity and on behalf of the state without representation or action of the Attorney General of the State. *State of Missouri v. Homesteaders Life Ass'n*, 90 F.2d 543 (8th Cir. 1937), *cert. denied* 302 U.S. 717. Under these circumstances, the Director may file this brief without the consent of the parties to the action under Rule 37.5 of the Court.

2. The Director has obtained the consent of Petitioner Chuck Quackenbush to the filing of this brief. The Director has been advised that such consent in writing is or has been forwarded to the Court.

3. The Director has been unable to obtain the consent of Allstate Insurance Co. To date, Allstate has not said that it would not consent or that it would object to the filing of this brief. Counsel for the Director and counsel for Allstate were unable to discuss the matter of consent in time for Allstate to fully consider the matter and advise the Director of its decision prior to the deadline for the printing and filing of this brief. Counsel of record for the Director has been advised by counsel for Allstate that it is considering the question of consent and that written consent may, but not necessarily, be forthcoming.

4. The brief of the Director, if accepted for filing, will provide the Court with additional insight into how the resolution of the abstention issue will affect a different state regulator under a slightly different set of statutes. In this regard, and in its discussion of the abstention issue, the Director believes that its brief brings to the Court's attention matters not brought to the attention of the Court by the parties. As such, it will be of considerable help to the Court in its determination of whether to grant the writ of certiorari. Rule 37.1.

WHEREFORE, the Director of the Department of Insurance of the State of Missouri, Amicus Curiae,, moves the Court for its order granting it leave to file its Brief of Amicus Curiae in Support of Petition for Writ of Certiorari and directing the Clerk of the Court to file the same, and for such other and further relief as the Court deems just and proper.

/s/ Thomas W. Rynard

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## QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that the abstention powers of federal courts are limited to actions in equity, or alternatively, whether that court erred in limiting the exercise of *Burford* abstention solely to actions in equity.

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**BRIEF OF THE COMMISSIONER OF INSURANCE OF  
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**INTEREST OF *AMICUS CURIAE***

Jay Angoff is the duly appointed Director of the Division of Insurance of the State of Missouri. In that capacity he acts as statutory supervisor, rehabilitator and liquidator of troubled and insolvent insurance companies in both domiciliary and ancillary proceedings relating to the management of those types of enti-

ties. §§ 375.954, 375.958, 375.1174, 375.1160, 375.1166 and 375.1176, RSMo 1994. In serving in these capacities, the Director operates under a complex and complete system for the exercise of the state's police power in protecting the public and specific policyholders from the financial difficulties of affected insurance companies. *Klaber v. O'Malley*, 90 S.W.2d 396 (Mo. 1936)(superintendent acts as state officer when carrying out duties related to insurance company insolvency); *Lucas v. Manufacturing Lumbermen's Underwriters*, 163 S.W.2d 750 (Mo. 1942)(insurance department and its superintendent act as administrative agency when taking charge of an insurance company and is not merely a receiver); *Medallion Insurance Co. v. Whartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978)(regulation of financially impaired insurers involves a valid exercise of the police power in protecting both public and private interests).

Further, by statute, "The director as liquidator, any special deputy, all employees, agents and attorneys of the liquidator and the special deputy, and all employees of the state of Missouri when acting with respect to the liquidation shall be considered to be officers of the court when acting in such capacities and as such shall be subject to the orders and directions of the court with respect to their actions or omissions in connection with the litigation." Mo. Rev. Stat. §375.1182.5 (1994). This close connection between the court supervising the liquidation and the Director as liquidator has also resulted in the Director and the others made officers of the court being granted absolute judicial immunity from claims against them for their liquidation-related activities. *Id.*

The Director of the Department of Insurance has an interest in this case for a variety of reasons. First, and foremost, the core issue of the ability of the federal courts to interpose themselves in a complex and complete state regulatory scheme involving the financial condition of insurance companies is an important question of federal law which will immediately and substantially

affect the ability of the Director to carry out the state statutory mechanisms for dealing with financially impaired companies. The effect of this issue is not related solely to the insolvency proceeding under which the case came before the district and circuit courts. It will ultimately affect the entire scope of regulatory remedies for dealing with financially-impaired companies, from supervision to rehabilitation to liquidation.

Second, the Director is interested in the matter because of the conflict of opinions between the Eighth and Ninth Circuits on the issue. In *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995), the Eighth Circuit (the Circuit within which the Director is located) held that *Burford* abstention is not dependent on the existence of equitable remedies in the case. While this dichotomy between the circuits exists, state insurance regulators, such as the Director, will suffer the uncertainty of which approach applies. This is true even with respect to a circuit which has issued a pronouncement on the subject. As *Wolfson* and the opinion sought to be reviewed here show, this is an evolving issue in the area of insurance regulation, the two opinions having been handed down within little more than a month of each other. The confusion and uncertainty to be engendered by the difference in these two opinions in a developing area of the law can only lead to additional and protracted litigation in on-going and future supervision-rehabilitation-liquidation proceedings. The Director wishes to see such uncertainty eliminated.

Third, as set forth in greater detail in the argument section of this brief, the Director believes that the Ninth Circuit approach in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), incorrectly states the law with respect to abstention, particularly in the area of the regulation of financially impaired insurers. Both in terms of resolving any uncertainty existing by virtue of the difference between the Eighth and Ninth Circuits and to prevent the federal courts from interposing themselves

unduly in a matter of state regulatory concern, this Court should grant the writ of certiorari in this matter and adopt the *Wolfson* approach with respect to the issue.

*Amicus* has a substantial interest in the request for the Court's consideration of the underlying issue in this matter because of his responsibility for the regulation of financially impaired insurance companies within the state of Missouri. This brief is intended to provide the Court with a perspective of a state regulator operating under a slightly different set of statutes than the parties to this case and the effect of the *Garamendi* position on such a regulator.

## SUMMARY OF ARGUMENT

### I.

State law provides for a comprehensive system of the regulation of insurers in the area of supervision, rehabilitation and liquidation of financially impaired insurers. Abstention by federal courts from granting relief in cases before them is particularly apt to these type of proceedings under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Decisions by the federal courts of issues of substantial state concern in this area can only lead to a disruption of state efforts to establish a coherent policy with respect to the regulation of financially impaired insurers. The Ninth Circuit's *Garamendi* decision incorrectly decided that abstention was inappropriate in cases closely related to the collection and distribution of assets of the estate. Given the importance of this federal law question of abstention, its nationwide effect on the regulation of financially impaired insurers by state regulators and the difference of opinion on this issue between the Eighth and Ninth Circuits, the Court should issue its writ of certiorari and enter its opinion that federal courts should abstain from deciding such issues.

## SUMMARY OF ARGUMENT

### II.

The essence of *Garamendi* is that the abstention doctrine has limited application to actions sounding in equity and that, since the action before it was not one in equity, there could be no abstention. The Ninth Circuit both mischaracterized the type of action before it and also unduly limited the abstention doctrine to equitable remedies. An action in receivership has been recognized by the Court as involving the exercise of equitable powers. *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176 (1935). The determination of the issue of set-off was inextricably related to the receivership functions of collecting and distributing assets. As such, it would have involved an exercise of the district court's equitable powers. In addition, the limitation of abstention to equity actions ignores that abstention relates to the fashioning of a remedy by a federal court and not to its exercise of jurisdiction. There is no just reason why discretion cannot also be exercised in matters at law, particularly where the federal court is merely deferring to the state court to consider a matter of substantial state concern and to allow it the opportunity to first resolve the matter in a complete and acceptable manner. Given the importance of the abstention issue as an issue of federal law and the conflict between the Eighth and Ninth circuits on the matter, the Court should issue its writ of certiorari to resolve the issue and determine that abstention was proper under the circumstances presented to the district court.

## ARGUMENT

### I.

#### **THE POSITION ON ABSTENTION EXPRESSED IN *GARAMENDI* v. *ALLSTATE INSURANCE CO.*, 47 F.3d 350 (9th Cir. 1995), WOULD PERMIT FEDERAL COURTS TO UNDULY INTERFERE IN COMPLEX AND COMPLETE STATE STATUTORY SCHEMES FOR THE REGULATION OF FINANCIALLY IMPAIRED INSURERS.**

The Court should grant its writ of certiorari to consider the decision of the Ninth Circuit in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), both because that decision wrongly decides the important question of federal court abstention in the context of proceedings to regulate financially impaired insurers and because that decision conflicts with the Eighth Circuit's position on the same issue. *Wolfson v. Mutual Benefit Life Insurance Co.*, 51 F.3d 141 (8th Cir. 1995). The *Wolfson* approach correctly applies the policy considerations underlying the federal abstention doctrines.

Among other circumstances, abstention is "appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . . . In some cases, however, the state question need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976). In essence, abstention under these circumstances recognizes that the definition and interpretation of state policy of substantial public concern is more appropriately made by state courts, particularly when deferral would not implicate matters of sig-

nificant federal concern. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943) (abstention appropriate in part because ultimate review of federal questions by federal court was preserved). The *Garamendi* decision trivializes the disruption of the state efforts to establish a coherent policy with respect to the regulation of financially impaired insurers by state departments of insurance, as well as ignores the absence of a significant federal issue in the matter.

Under the Missouri regulatory scheme, which would be substantially impaired by the *Garamendi* position, the Director, his appointed deputies and the employees of the State Department of Insurance working on insolvency matters assist the state court in the administration of estates of insolvent companies. The state legislature has determined that such an intimate relationship between the Director and the receivership court is so essential to the success of the regulatory scheme that it has designated the Director and his associates as officers of the court in their receivership-related activities. Mo. Rev. Stat. § 375.1182.5 (1994). The importance of the Director and his associates to the receivership process is further reflected by the fact that the legislature has granted absolute judicial immunity to these individuals when they are carrying out their functions as officers of the court in a receivership proceeding. Mo. Rev. Stat. § 375.1182.5 (1994).

One of the salient characteristics of the regulatory scheme which called for federal court abstention in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943), was that the agency and the state courts were "working partners in the business of creating a regulatory system" for the industry affected. 319 U.S. at 326, 63 S. Ct. at 1103. The same is true with respect to the California regulatory scheme considered in *Garamendi* and other insurance insolvency and rehabilitation regulatory schemes in the other states. The particularly close working partnership exhibited under the Missouri statute would be jeopardized by the position of the Ninth Circuit.

In addition, the heart of the claim underlying *Garamendi* was the claim of Allstate as a reinsurer to obtain a set-off of monies it was owed by the insolvent insurers against the monies it owed that entity. *Garamendi*, Petition for Writ of Certiorari, Appendix A, at 4a. As the California and Missouri statutes illustrate, the determination of if and when a set-off is available is a question which will have substantial impact on the estate of the insolvent. The question is not as simple as the Ninth Circuit has painted it in terms of merely balancing the ledgers of the insolvent company.

The complicated nature of the set-off question is well-illustrated by the Missouri set-off statute. There are specific limitations on the ability of reinsurers to set off mutual credits or debts. Mo. Rev. Stat. § 375.1198.2(6) & .3 -.6 (1994). The meaning of these specific limitations intended by the legislature and their application to the existing complex reinsurance arrangements must be first determined before a final liability can be determined. There are also general limitations on the right of set-off. Mo. Rev. Stat. §§ 375.1198.2(4) & (5), & 375.1204 (1994). The application of these provisions to reinsurers ceding and being ceded business with the insolvent insurer under the state statutory scheme for regulating insolvent insurers is another matter which would have to necessarily be resolved before ledgers could be balanced.

The complexity of the issue becomes even more apparent when the interplay of the different statutes under which the regulation of troubled and insolvent insurers occurs is considered.<sup>1</sup> Under Missouri law, substantive rights of the various

<sup>1</sup> With respect to troubled and insolvent insurers Missouri operates under the Uniform Insurer's Liquidation Act, Mo. Rev. Stat. §§ 375.950 - 375.990 (1994), the Insurers Supervision, Rehabilitation and Liquidation Act, Mo. Rev. Stat. §§ 375.1150 - 375.1246 (1994), and other provisions, Mo. Rev. Stat. §§ 375.570 - 375.750 (1994).

parties involved in a proceeding depends on the date at which the proceeding was initiated, the relevant date being August 31, 1991. Mo. Rev. Stat. § 375.1158 (1994). Thus, it would first be necessary to determine if set-off was procedural or substantive under this statute.<sup>2</sup> Then, if set-off was allowed, the federal court would be required to consider the issue of the application of the Missouri set-off statute. Only then could it determine the extent of the mutual credits and debts.

The Missouri statutes on supervision, rehabilitation and liquidation of financially impaired insurers, like the California statute, is an all-encompassing, comprehensive self-contained statutory scheme for protecting public and private interests from the financial insolvency of insurers. *O'Malley v. Prudential Casualty & Surety Co.*, 80 S.W.2d 896, 897 (1935); *Medallion Insurance Co. v. Whartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978). Debts owed by reinsurers to the insolvent company under reinsurance agreements are significant and substantial assets of the insolvent company and integral to the success of the efforts of the state regulators to protect the public and policyholders from the insolvency of the company. *Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283, 1287-88 (W.D. Mo. 1991).

The Ninth Circuit has overlooked this nexus between the recovery of assets of the insolvent estate and the success of the state's regulatory schemes in supervising, rehabilitating and liquidating financially impaired insurers. On the other hand, this Court has specifically recognized that statutory schemes for marshalling assets and settling the affairs of financially strapped

<sup>2</sup> For the same issue under consideration by the Ninth Circuit in *Garamendi*, set-off was determined by a federal district court to be unavailable to reinsurers in a liquidation proceeding under both Missouri common law and the statutory procedure then in existence. *Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283, 1286-87 (W.D. Mo. 1991).

entities should be self-contained and the importance of refraining from outside interference with those entrusted with carrying out these activities. *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 183, 55 S. Ct. 380, 384 (1935)(federal court should not undertake to appoint receiver and liquidate banking corporation where there is nothing to indicate that state procedure for obtaining the same ends is inadequate or will not be diligently and honestly followed).

*Garamendi* has incorrectly resolved the important issue of abstention in proceedings dealing with the comprehensive state regulatory schemes for insolvent insurers. Its position is also in conflict with the position of the Eighth Circuit on the same issue. The Court should issue its writ of certiorari to resolve this issue.

## ARGUMENT

### II.

#### **THE POSITION ON ABSTENTION EXPRESSED IN *GARAMENDI* v. *ALLSTATE INSURANCE CO.*, 47 F.3d 350 (9th Cir. 1995), MISCONSTRUES THE NATURE OF THE ACTION BEFORE IT AND, ALTERNATIVELY, WOULD UNDULY LIMIT THAT DOCTRINE TO ACTIONS AT EQUITY.**

The essence of *Garamendi* is that the abstention doctrine has limited application to actions sounding in equity and that, since the action before it was not one in equity, there could be no abstention. In *Garamendi*, the Ninth Circuit both mischaracterized the type of action before it and also unduly limited the abstention doctrine to equitable remedies. Given the importance of the abstention issue as an issue of federal law and the conflict between the Eighth and Ninth circuits on the matter, the Court should issue its writ of certiorari to resolve the issue.

The petitioner here set forth a number of examples of the equitable nature of the issues before the district court. In addition

to those, the Ninth Circuit failed to see that the basic relief sought was itself equitable in nature. In *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 55 S. Ct. 380 (1935), the Court recognized that an action to liquidate a going business concern — the process of appointing a receiver to collect the assets of the business, convert them to cash and pay the creditors of the business — was an exercise of the court's equity powers. 294 U.S. at 183, 55 S. Ct. at 383-84.

The issue of the set-off which is the heart of the *Garamendi* case, when correctly viewed in its form and effect, is merely one part of this equitable process of liquidation. Receivables of a reinsurer owed to the insolvent insurer is a part of the marshalling of the assets of the estate. *Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283, 1287-88 (W.D. Mo. 1991). Under the California set-off statute under consideration in *Garamendi* and the similar Missouri set-off statute, a set-off combines the function of both marshalling the assets of the estate as to the amount owed the insolvent by the reinsurer and making a distribution as to the amount owed by the insolvent company to the insurer. This is an integral part of the equitable receivership process. A federal district court should not be allowed to avoid application of the abstention doctrine on the basis that it has been asked to interpose itself in a singular aspect of the comprehensive receivership process.

The Ninth Circuit approach would also unduly limit the application of the abstention doctrine to cases involving the equity remedy. In rejecting the "legal" side of the federal court's judicial powers, the Ninth Circuit appears to confuse the question of jurisdiction with the question of remedy. Abstention deals with the remedy to be afforded a party, not to whether the court has the jurisdiction to consider the question presented. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359, 109 S. Ct. 2506, 2513 (1989).

As noted in *Harrison v. NAACP*, 360 U. S. 167, 177 (1959), the effect of abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." A decision to refrain from granting a remedy in an action at law in order to defer to the state court in recognition of its role as the final expositor of state law and to give it an opportunity to fashion a remedy which may be acceptable to the parties is not contrary to a federal court's full exercise of its jurisdiction. In form and effect, as in the doctrine of exhaustion of remedies, the federal court is merely deferring to the state court to consider a matter of substantial state concern and to allow it the opportunity to first resolve the matter in a complete and acceptable manner. Such an exercise of discretion in affording a state remedy by a federal court should not necessarily be limited to actions sounding in equity. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543 (1985).

The Ninth Circuit was wrong both as to its characterization of *Garamendi* as a case solely involving legal remedies and in limiting the *Burford* abstention doctrine to actions involving equitable remedies. In this latter regard, the *Wolfson* opinion of the Eighth Circuit correctly determines this issue. The Court should issue its writ of certiorari for the purpose of adopting the Eighth Circuit approach to the issue.

## CONCLUSION

The doctrine of *Burford* abstention is not limited to actions involving equitable remedies. The Ninth Circuit too narrowly limits this doctrine in its *Garamendi* decision. The Court should issue its writ of certiorari in order to review the Ninth Circuit's decision and issue its opinion adopting the Eighth Circuit approach on the issue.

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## **APPENDIX**

## APPENDIX A

**375.1158. Provisions apply prospectively, exceptions—restrictions on insurer in delinquency proceeding.—**1. Unless otherwise provided, the portions of sections 375.1150 to 375.1246 which substantively affect the rights of any person shall be only applicable prospectively. The provisions of sections 375.650 to 375.700, sections 375.740 and 375.750, and sections 375.950 to 375.990 shall be effective and apply only to proceedings instituted pursuant to those sections prior to August 28, 1991. The provisions of sections 375.1150 to 375.1246 which are procedural in nature and which do not conflict with any provision of sections 375.570 to 375.750 and sections 375.950 to 375.990 applicable to any proceeding instituted prior to August 28, 1991, shall be applicable to proceedings instituted prior to August 28, 1991; provided that the provisions of this subsection shall not affect any final order entered by a court of competent jurisdiction prior to August 28, 1991.

**375.1182. Powers of liquidator—insureds may purchase extended period to report claims, when, limitations—liquidator and employees deemed officers of the court.—**

\* \* \*

.5 The director as liquidator, any special deputy, all employees, agents and attorneys of the liquidator and the special deputy, and all employees of the state of Missouri when acting with respect to the liquidation shall be considered to be officers of the court when acting in such capacities and as such shall be subject to the orders and directions of the court with respect to their actions or omissions in connection with the liquidation. The liquidator, special deputy, commissioners and referees appointed by the court, the agents, attorneys and employees of the liquidator and employees of the state of Missouri when acting with respect to the liquidation shall enjoy absolute judicial immunity and be immune from any claim against them personally for any

act or omission committed in the performance of their functions and duties in connection with the liquidation.

**375.1198. Mutual credits or debts, setoffs allowed—exceptions—procedures.**—1. Mutual debts or mutual credits, whether arising out of one or more contracts, between the insurer and another person in connection with any action or proceeding under sections 375.1150 to 375.1246, sections 374.216 and 374.217, RSMo, and section 382.302, RSMo, shall be set off and the balance only shall be allowed or paid, except as provided in subsections 2, 3, 4, 5 and 6 of this section and section 375.1204.

.2 No setoff shall be allowed in favor of any person where:

(1) The obligation of the insurer to the person would not as of the date of the filing of a petition for liquidation entitle the person to share as a claimant in the assets of the insurer;

(2) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff; or

(3) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

(4) The obligation of the insurer is owed to an affiliate of such person or to any entity or association, rather than the person; or

(5) The obligation of the person is owed to an affiliate of the insurer or to any other entity or association, rather than the insurer; or

(6) The obligations between the person and the insurer arise from reinsurance relationships resulting in business which is both ceded to and assumed from the insurer.

.3 As soon as practicable, the receiver shall provide persons who assumed business from the insurer as reinsurers with statements of account identifying debts which are currently due and payable to the insurer. Such persons may set off against such debts only mutual credits which are currently due and payable by the insurer to such persons for the period covered by the accounting statements.

.4 A person who ceded business to the insurer may set off debts due the insurer against only those mutual credits which the person has paid or which have been allowed in a delinquency proceeding.

.5 Notwithstanding the foregoing, a setoff of sums due on obligations in the nature of those prescribed in subdivision (6) of subsection 2 of this section shall be allowed for those debts accruing from business written under reinsurance contracts which were entered into, renewed or extended with the express written approval of the director where Missouri is the state of domicile of the insolvent insurer and when in the judgment of the director such action is deemed necessary or advisable in order to prevent or mitigate a threatened impairment or insolvency of a domiciliary insurer, in connection with supervision or conservation proceedings pursuant to this act or otherwise in connection with the exercise of the director's regulatory responsibilities concerning a threatened impairment or insolvency without the institution of any delinquency proceedings.

.6 The provisions of this section shall apply to all obligations incurred under contracts entered into, renewed, or extended on or after July 1, 1992, and to any existing contract with a termination date longer than one year from January 1, 1993, and shall supersede any contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer; provided that the provisions of subdivision (6) of subsection 2 and subsections 3, 4 and 5 of this

section shall not apply to insurers or reinsurers until such time that the director determines that substantially similar provisions are effective in a sufficient number of states so as not to place domestic insurers or reinsurers at a competitive disadvantage. The director shall promulgate a rule announcing any determination as is necessitated by this subsection.

**375.1202. Reinsurers, amounts recoverable not reduced due to delinquency proceedings.**—The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of the delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate.

**375.1204. Payment of unearned premiums required—failure to pay, penalties.**— .1 An agent, broker, premium finance company, or any other person, other than the insured, responsible for the payment of a premium, shall be obligated to pay any unpaid earned premium due the insurer at the time of the declaration of insolvency as shown on the records of the insurer. The liquidator shall also have the right to recover from such person any part of an unearned premium that represents commission of such person. Credits or setoffs or both shall not be allowed to an agent, broker, or premium finance company for any amounts advanced to the insurer by the agent, broker, or premium finance company on behalf of, but in the absence of a payment by the insured. An insured shall be obligated to pay any unpaid earned premium due the insurer at the time of the declaration of insolvency, as shown on the records of the insurer.

.2 Upon satisfactory evidence of a violation of this section, the director may pursue either one or both of the following courses of action:

(1) Suspend or revoke or refuse to renew any licenses issued by the department of insurance to such offending party or parties;

(2) Impose an administrative penalty of not more than one thousand dollars for each and every act in violation of this section by said party or parties. All amounts collected as a result of imposition of such administrative penalties shall be paid to the state treasurer for deposit to the general revenue fund.

.3 Before the director shall take any action as set forth in subsection 2 of this section, he shall give written notice to the person, company, association or exchange accused of violating the law, stating specifically the nature of the alleged violation and fixing a time and place, at least ten days thereafter, when a hearing on the matter shall be held. After such hearing, or upon failure of the accused to appear at such hearing, the director, if he shall find such violation, shall impose such of the penalties under subsection 2 of this section as he deems advisable.

.4 When the director shall take any action provided by subsection 2 of this section, the party aggrieved may appeal said action to the court within thirty days of the director's decision.